

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARTHA M. SADIQ
Claimant

VS.

CESSNA AIRCRAFT CO.
Self-Insured Respondent

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Docket No. 1,013,368

ORDER

Respondent requested review of the July 6, 2005 Award by Administrative Law Judge John D. Clark. Although originally scheduled for oral argument before the Board, upon the request of the parties this case was placed on the summary docket calendar on September 14, 2005, for decision without oral argument.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. P. Kelly Donley of Wichita, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In their joint request that this case be placed on the summary docket the parties agreed the Administrative Law Judge (ALJ) used an incorrect maximum compensation rate in the calculation of the benefits due claimant.

ISSUES

The ALJ found the claimant sustained a 42 percent work disability based upon a 26 percent task loss and a 58 percent wage loss.

In its brief to the Board, the respondent notes the ALJ did not use the correct compensation rate for the stipulated August 28, 2003 date of accident. Accordingly, respondent requests, at a minimum, the award be recalculated using the correct compensation rate. Respondent does not dispute the ALJ's finding regarding the claimant's task loss but argues the claimant's post-injury average weekly wage should be increased which would diminish the claimant's wage loss and resultant work disability.

Respondent specifically argues that claimant's post-injury average weekly overtime was a greater amount than determined by the ALJ.

Claimant did not file a brief but would presumably request the Board to recalculate the award based upon the correct compensation rate for the stipulated accident date of August 28, 2003, and affirm the award in all other respects.

The sole disputed issue for Board review is the wage loss component of the work disability formula. Specifically, the amount of weekly overtime that should be added to claimant's post-injury weekly base wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The parties stipulated that claimant's pre-injury average gross weekly wage was \$748.21 exclusive of fringe benefits.¹ The maximum compensation rate for an August 28, 2003 accident date is \$440 per week. In the calculation of the award the ALJ used \$467 as the weekly compensation rate. The Board will use the correct maximum weekly compensation rate of \$440 in the calculation of the claimant's benefits.

Claimant was employed by Cessna from January 4, 1999, through August 28, 2003. After a functional capacities evaluation scheduled by respondent claimant was provided restrictions. She was then placed on a leave of absence due to the respondent not being able to accommodate her restrictions. Claimant was then provided medical treatment which ultimately resulted in bilateral carpal tunnel release surgeries. Upon her release from treatment, claimant began a job search including attempting to obtain re-employment with respondent.

At the time of regular hearing, the claimant was working two part-time jobs but had been unable to find a full-time position. However, shortly after the regular hearing one of the part-time jobs became a full-time position. The claimant testified regarding her salary at the full-time post-injury job she had with Northview Developmental Services (Northview). Claimant earned a base salary of \$7 an hour for a 40-hour work week. Claimant further testified she received overtime and expected to work between 8 and 16 hours of overtime a week. An exhibit was offered at her deposition which contained the amount of overtime

¹ The parties agreed the claimant's fringe benefits would continue for two years after her lay-off on August 28, 2003.

pay the claimant had earned to the date of her deposition.² The ALJ divided that sum by the ten weeks represented by the exhibit to arrive at the average weekly overtime to add to the claimant's base post-injury average weekly wage. But after the claimant's deposition was taken the parties filed a stipulated wage statement which included information regarding an additional eight weeks of overtime benefits claimant had received in her post-injury employment with Northview.

The respondent does not dispute the ALJ's finding that claimant suffered a 26 percent task loss as a result of her work-related injuries. But respondent argues the claimant's post-injury average gross weekly wage should be increased based upon the wage statement stipulation the parties filed May 20, 2005.

Respondent argues that only a six week period should be used to determine claimant's post-injury average weekly overtime. The Board disagrees. The average weekly overtime is the total amount earned by the employee in excess of the of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident.³ The Board concludes the entire time period reflected on the wage statement stipulation dated May 20, 2005, as well as the total sum of overtime claimant earned should be considered in order to determine the average weekly overtime.

Dividing the \$1,236.38 overtime sum reflected on the stipulated wage statement by 18 weeks results in an average weekly overtime of \$68.69. The claimant's post-injury average weekly wage of \$280 plus the weekly overtime of \$68.69 results in a post-injury average weekly wage of \$348.69. The claimant's \$348.69 post-injury average weekly wage when compared to the stipulated \$748.21 pre-injury average weekly wage results in a 53 percent wage loss.

It should be noted that after claimant was released to return to work she worked part time for two employers before beginning work full time at Northview. During this period of time her percentage of work disability would have been different than that determined as a result of her full-time employment at Northview. In this case, because there is no gap in benefits, the award of permanent partial disability compensation the claimant is entitled to receive calculates the same by using only the last wage loss percentage and the last percentage of work disability. Therefore, the award will be calculated based upon a 39.5 percent permanent partial disability which is arrived at by averaging the 26 percent task loss with the 53 percent wage loss.

² Sadiq Depo., Ex. 2.

³ K.S.A. 2004 Supp. 44-511(b)(4)(B)(iii).

Finally, the Board notes the stipulated average weekly wage of \$748.21 did not include fringe benefits. It was agreed that claimant's fringe benefits would not terminate until August 28, 2005. In the determination of the average gross weekly wage, the value of additional compensation (fringe benefits) is not included until and unless such remuneration is discontinued.⁴ That change had not occurred at the time of the ALJ's Award and was not considered by the ALJ in the determination of the pre-injury average weekly wage. Accordingly, the review by the Board will likewise not consider any alleged change after the ALJ's Award.

Moreover, at the regular hearing the claimant offered an exhibit which purported to establish the value of fringe benefits. The document contains a list of purported benefits but does not offer evidence as to exactly which items claimant is contending should be considered additional compensation. Nonetheless, if the additional compensation items were discontinued after the regular hearing, either party can request another review and modification or the parties can mutually resolve this issue.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge John D. Clark dated July 6, 2005, is modified to reflect a compensation rate of \$440 per week and a 39.5 percent work disability.

The claimant is entitled to 18 weeks of temporary total disability compensation at the rate of \$440 per week or \$7,920 followed by 162.74 weeks of permanent partial disability compensation at the rate of \$440 per week or \$71,605.60 for a 39.5 percent work disability, making a total award of \$79,525.60.

As of October 20, 2005, there would be due and owing to the claimant 18 weeks of temporary total disability compensation at the rate of \$440 per week in the sum of \$7,920 plus 94 weeks of permanent partial disability compensation at the rate of \$440 per week in the sum of \$41,360 for a total due and owing of \$49,280, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$30,245.60 shall be paid at the rate of \$440 per week for 68.74 weeks or until further order of the Director.

IT IS SO ORDERED.

⁴ K.S.A. 2004 Supp. 44-511(a)(2).

Dated this _____ day of October 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
P. Kelly Donley, Attorney for Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director